SUPREME COURT, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1163

FELIX WALLS, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 28, 1974

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Petitioner, Felix Walls, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered November 1, 1973 and denial of the rehearing en banc entered November 29, 1973 affirming both a judgment of conviction for purchase and possession of heroin in violation of 26 U.S.C. 4707(c) and 21 U.S.C. 174.

OPINIONS BELOW

The U.S. Court of Appeals for the Sixth Circuit reversed the first conviction 443 F.2d 1220. A mistrial was declared in the second trial. The Court of Appeals, after argument, affirmed the judgment of conviction, without an opinion. Rehearing denied.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit, was entered on November 1, 1973, affirming petitioner's conviction dated November 30, 1972. The Court of Appeals denied a timely petition for rehearing on November 29, 1973. On January 8, 1974 Mr. Justice Stewart signed an order extending the time for filing this petition for certiorari to and including January 28, 1974. The jurisdiction of the court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

WHETHER: Defendant was deprived of his right to a speedy trial resulting in prejudice; amongst other things, the scene of the offense was ruled to be so markedly different from the time of the alleged crime, the jury was not allowed to view it; a main excupatory witness was no longer available to personally testify on his behalf.

WHETHER: The refusal of the court to accept evidence that the missing government informant had made a statement incriminating himself and exculpating defendant violated federal rule 804(b) (4).

WHETHER: The trial court committed Reversible error when after denying defendant's motion to allow the jury to view the scene of the alleged transfer of heroin (T. 506) and after several defense witnesses testified as to the conditions presently at the scene, instructed the jury that conditions at the scene had markedly changed and a view of the scene would only confuse

the jury, thereby in effect undercutting the testimony of several defense witnesses and ultimately defendant's case.

WHETHER: It was improper for the court to relinquish jurisdiction over the defendant, where doing so increases the amount of time defendant would have to serve.

STATEMENT OF THE CASE

The Government obtained the release of James Riley, Jr., a convicted drug peddler, serving sentence at Fort Leavenworth, Kansas, and retained him as an informant to arrange narcotic purchases while under surveillance.

One such purchase was allegedly made from Petitioner Walls, at his residence, under the surveillance of Agents from the Bureau of Narcotics and Dangerous Drugs (BNDD). The Informant, who was arrested and indicated along with petitioner Walls and one Sylvia Laster, did not appear as a defendant or witness at the first trial. The Government, just days before the first trial, informed both the court and defense counsel that despite its diligent efforts they were unable to locate Riley its retained informant.

Thus all of the Government's trial proof was derived from the testimony of Agents of the Federal Bureau of Narcotics and Dangerous Drugs (BNDD). Their conflicting testimony was essentially as follows:

On the evening of April 8, 1969, (BNDD) agents met with informant Riley and discussed plans for a pending meeting with Petitioner Walls and the possibility of receiving a large quantity of heroin. (Tr. 133, 175-176, 346). Around 1:30 A.M. on April 9, 1969 Agents (BNDD) met with Riley a couple of blocks from defendant's residence, Tr. 176). And after a cursory search (Tr. 287) of Riley's person and his car for narcotics, instructed him to take a taxi to defendant's house, get the heroin, place it in a pink bag, which he had with him (Tr. 133-135, 176, 346-347), and try to lure Petitioner Walls outside.

At about 2:00 A.M. April 9, 1969, informant Riley

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alighted from a taxicab and entered Petitioner's residence. Some twenty minutes later Riley and Petitioner appeared at the door. Agent Dwyer testified that by the use of special binoculars and a vestibule light he observed Petitioner Walls hand Informant Riley a large light colored bag and both walked down the steps toward an awaiting cab. Federal Agents (BNDD) drove up and shouted "Federal Officers, Stop" (Tr. 351). Petitioner ran toward the house and was overtaken and arrested along with informant Riley and Sylvia Laster, who was in the upstairs apartment. Subsequently it was verified that the bag seized from informant Riley contained heroin. (Tr. 201, 333-34).

THE PETITIONER'S DEFENSE

The defense relied upon the deficiencies in the government's proof. A basic defect existed in the prosecution's case with regard to the reliability of the informant, the exculpatory statement of the Informant. (However, just prior to the first trial the government announced that the Informant was unavailable as a witness).

Although Agent Dwyer, in charge of the investigation, claimed that he *thoroughly* searched the informant and the informant's car, prior to the alleged transaction, cross-examination revealed that the search was only cursory in nature (Tr. 287).

Assuming that all of the other deductions that the government sought to draw from agents' observations were correct, there was no direct evidence that the petitioner knew or had reason to know that he was in the middle of a heroin transaction. Petitioner maintained through his counsel that he was "Framed".

ARGUMENT

I. DEFENDANT WAS DEPRIVED OF HIS RIGHT TO A SPEEDY TRIAL RESULTING IN PREJUDICE; AMONGST OTHER THINGS, THE SCENE OF THE OFFENSE WAS RULED TO BE SO MARKEDLY DIFFERENT FROM THE TIME OF THE ALLEGED CRIME, THE JURY WAS NOT ALLOWED TO VIEW IT; A MAIN EXCULPATORY WITNESS WAS NO LONGER AVAILABLE TO PERSONALLY TESTIFY ON HIS BEHALF.

Defendant was arrested on April 9, 1969. A non-jury trial was held June 10, 1970. Defendant was convicted. The conviction was reversed on June 14, 1971. On November 11, 1971, he made a motion to dismiss on the grounds he had been denied a speedy trial. Said motion was denied. An appeal was denied without prejudice to raising the issue after trial (Order, 2- 16- 72). On December 14, 1971, the new trial commenced. It terminated when the judge ordered a mistrial (see Issue IV, supra). The third trial commenced, after defense counsel reviewed the speedy trial motion (3T 80) on November 28, 1971.

The first Motion to Dismiss the indictment for lack of a speedy trial was made June 4, 1970. The trial court took the Motion under advisement but never ruled thereon (1 App. 62-65).

The United States Supreme Court recently set forth the factors to be considered in determining whether the speedy trial provision of the Bill of Rights has been violated. *Barker vs. Wingo*, 407 U.S. 514, 92 S. Ct. 2181, 33 L. Ed. 2d 101 (1972).

The four factors that must be considered to determine whether the defendant's right to a speedy trial had been violated are: (1) length of delay; (2) reason for delay; (3) assertion of right, and (4) prejudice to defendant, personal and to his defense (at 530).

The length of time was great; eleven months between arrest and first trial; twenty-two months between second trial and the present trial. The time involved, especially between the second and third trial was overly long and unreasonable.

The reason for these extensive delays are not included, except those short periods where pretrial motions were pending. Certainly the vast majority of the time elapsed was not due to the conduct of defendant.

The defendant did assert the right and make a demand for speedy trial before the second trial. In light of the fact there was an additional delay of almost two years between the second and third trials during which period the demand was still in effect, it is clear the defendant was asserted in a timely manner his right.

The prejudice to defendant was at both levels discussed by the Supreme Court. Defendant was personally prejudiced by having a felony charge pending against him for such an extensive period. His ability to present his defense was actually prejudiced in an extreme manner. He was not able to present at the third trial, Ms. Laster who did testify at the first trial. The jury did not have the benefit of observing her demeanor when she gave her testimony.

The jury was also deprived, primarily due to the delay, from observing the scene where defendant was arrested. The key factual issue was the ability of the government agents to see from where they were parked to the porch. There was conflicting testimony as to the surrounding physical characteristics of the house (awning, no awning), landscape and lighting as well as distances involved. The delay caused the Judge to rule (3T 506) against the jury being allowed at the third trial to view the scene. (At the first trial another trial judge felt it important to see the scene; at the second trial the judge was not presented with the question due to its abbreviated nature.)

An analysis of all the factors: it is clear the delay was extreme; it was mostly not due to the defendant, defendant did

seek a speedy trial, and there was both personal prejudice to defendant as well as prejudice to his defense.

Appellant was tried on a later charge before being tried the second time on the charges in the instant case by the same Assistant District Attorney, 9-8-71. That trial resulted in a Directed Verdict in favor of appellant after the government rested its case. Thereafter, appellant had to post a Ten Thousand Dollar surety bond to gain his release in this cause.

The government made no effort to bring appellant back from prison for trial after reversal of his conviction June 14, 1971. Therefore, the indictment should be quashed.

II. THE REFUSAL OF THE COURT TO ACCEPT EVIDENCE THAT THE MISSING GOVERNMENT INFORMANT HAD MADE A STATEMENT INCRIMINATING HIMSELF AND EXCULPATINGS DEFENDANT VIOLATED FEDERAL RULE 804 (b) (4).

At the outset, we note that the trial court's ruling on the issue herein argued was based on Rule 804 (b) (4), which was not effective at the time of appellant's trial, and as yet have not been approved by Congress. Accordingly, it is our position that the court had no right to rely on said Rule as authority for the issue at hand.

Wilfred C. Rice, defendant's attorney at the first two trials and defendant's attorney for post-conviction proceedings, was prepared to testify that the so-called informant Riley used by the government had said:

"Q. What did he say to you?

"A. He said it was his. He said that I didn't have anything to worry about, that he was going to straighten this matter out, that all of the stuff that was involved was his, and that he was going to straighten it out and clear my client up."

The Court ruled the statement was not against declarant's penal interest (3T 486).

A summary of the rule is found in Federal Rules of Evidence 804 (b) (4), entitled statement against interest. The advisory committee note relevant to the rule is most helpful. It indicates the reason such declarations are assumed to be reliable is "that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true" 93 S. Ct. 136 (1973). While the rule does not take effect until July 1, 1973, the advisory note indicates the logical absurdity of disallowing such evidence. In fact the trial court ruled it inadmissible on the basis it was not in fact against declarant's penal interest. Thus, the relevant question is, was the statement made by Riley to Attorney Rice against declarant's penal interest?

Declarant Riley had several charges pending as well as an appeal pending. He was allowed out of prison on bond pending appeal to aid the government. Subsequent to his aiding the government, charges were in fact dropped in at least one case.

The Court ruled the government knew the material (heroin) in the present case was not Riley's. However, it was in fact possible that the material had been hidden by Riley to use against defendant. Thus, a statement admitting the same to the government would have subjected him to criminal sanction.

Moreover, such an admission by declarant would jeopardize his status as a government worker. That would in turn jeopardize his status of being on bond pending appeal. An increase in amount of bond or cancellation of bond would have placed him back in prison.

Since the statement was against declarant's penal interest it should have ben admitted. The error was exacerbated by the Court not allowing in a statement found in the testimony of Ms. Laster at the first trial of June, 1969 proceeding (3T 156).

A very recent Supreme Court case is analogous. *Cool vs. United States*, ____ US ___, __S. Ct.____; 34 L. Ed. 2d 335 (1972). In that case an alleged accomplice made a statement exculpating defendant. The trial judge instructed the jury that they may consider the accomplice's statement only if the jury" . . . believe it were true beyond a reasonable doubt . . . "at 338 The Supreme Court ruled this was reversible error, because

it deprived defendant's Sixth Amendment right to present to the jury exculpatory testimony of an accomplice and substantially changed the burden of proof.

The Court said:

> "It is possible that Voyles' testimony would have created a reasonable doubt in the minds of the jury, but that it was not considered because the testimony itself was not believable beyond a reasonable doubt. *By creating an artificial barrier to the consideration of relevant defense* testimony putatively credible by a preponderance of the level of proof necessary for the Government to carry its burden."

It is clear it is error to reduce the weight to be given an exculpatory statement by an accomplice; it is certainly error to prevent an exculpatory statement from an accomplice informer.

In order for the court to rule that the alleged statement made was not against Riley's penal interest, the court would have to conclude in his mind that the contraband was not Riley's which was a question of fact for the jury to decide. Walls denied possession of the contraband. The jury had a right to believe it belonged to and was possessed by Riley. The court's ruling precluded this right of the jury. If in fact the contraband were Riley's it would certainly be against his penal interest. Thus, a new trial should be granted.

III. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN AFTER DENYING DEFENDANT'S MOTION TO ALLOW THE JURY TO VIEW THE SCENE OF THE ALLEGED TRANSFER OF HEROIN (T. 506) AND AFTER SEVERAL DEFENSE WITNESSES TESTIFIED AS TO THE CONDITIONS PRESENTLY AT THE SCENE, INSTRUCTED THE JURY THAT CONDITIONS AT THE SCENE HAD MARKEDLY CHANGED AND A VIEW OF THE SCENE WOULD ONLY CONFUSE THE JURY, THEREBY IN EFFECT TESTIFYING AND UNDERCUTTING THE TESTIMONY OF SEVERAL DEFENSE WITNESSES AND ULTIMATELY DEFENDANT'S CASE.

The main factual issue at trial was whether in fact a person on the porch of the house could be seen from where the federal agents were in a parked car. Defense counsel made repeated requests to have the jury taken to the scene (3T 501). The requests were finally denied by the trial judge (3T 506). In response to the denial the defense had witnesses testify to the present appearance at the scene (3T 525 et seq., 543 et seq., 477 et seq.). Attorney Rice (3T 477 et seq.), Father Thomas (3T 543 et seq.), and Terry Novak (3T 525 et seq.) testified that they could not see the porch where the alleged transfer of the heroin occurred. This was the crux of defendant's case (3T 110). That is that the federal agents were careless and relied too heavily on Riley (3T 622).

The Court, during instructions to the jury, said:

> "There has been talk during the trial about a possible visit to the scene. I have concluded that such a visit would not be in the interest of justice. Conditions have changed. Climatic conditions are markedly different. A visit instead of being helpful would likely prove confusing. Therefore you should know the Court has declined to order such a visit." (3T 654-655)

Defense counsel objected at the completion of the charge as being an improper comment on the evidence (3T 669). Counsel suggested the Court should have instructed the jury that for legal reasons the judge has determined the jury should not go to the scene (3T 669).

The Court defends its instruction by reiterating that in its opinion such a view would likely confuse the jury because of changed conditions (3T 669). Defense counsel indicates the only changes are to the detriment of defendant (3T 669). For example, the absence of an awning at the scene (3T 567), the subsequent removal of trees (3T 429).

The improper instruction may be considered improper comment on defendant's case; specifically, the witnesses who were called upon to testify as to the nature of the scene. Such comment was improper as it indicated to the jury that the court was unimpressed with the testimony on this key point. In fact it indicated to the jury the Court agreed with the position of the Assistant United States Attorney that the evidence should be entirely discounted.

One recent state court case indicates the importance of a judge not making a comment detrimental to either side in a criminal case:

> "While the weight of a trial judge's word may not equal the ton ascribed to the word of the President of the United States, he should remember how heavily it weighs with the jury." (cites omitted) *People vs. King*, 384 Mich. 310, 181 NW 2d 916 (1970). See also *Blunt vs. United States*, 244 F. 2d 355 at 365 (1957).

In *King* the judge mischaracterized the defendant's testimony. In this case the trial judge undercuts the entire theory of the defense.

Alternatively, the instruction of the trial judge may be characterized as testimony. The extreme danger of allowing a judge to testify was most recently recognized in Federal Rules of Evidence 605 and the Advisory Committee's Notes. See also

Blunt vs. United States, supra.

Either way the instruction is characterized, the harm is the same; demolition of defendant's case. Wherefore, a new trial is warranted absent the erroneous instruction.

IV. IT WAS IMPROPER FOR THE COURT TO RELINQUISH JURISDICTION OVER THE DEFENDANT, WHERE DOING SO INCREASES THE AMOUNT OF TIME DEFENDANT WOULD HAVE TO SERVE.

After the first conviction in June, 1970, defendant was sentenced to two (2) concurrent ten (10) year terms to run concurrently. Defendant had a state sentence of 7-1/2 - 14 years pending at said time. Defendant commenced serving the Federal sentence until September, 1971. Following the instant conviction, the court sentenced the defendant to the same terms; however, the court turned defendant over to State authorities to start serving the 7-1/2 - 14 sentence, and ordered the Federal sentence to run consecutive to the State sentence. This was tantamount to imposing on the defendant a greater sentence than was previously given without any showing of additional circumstances warranting a greater sentence, which is clear error.

Torrance vs. Henry, 304 F. Supp. 725
People vs. Winslow, 312 N.Y.S. 2d 495
North Carolina vs. Pearce, 395 U.S. 711 s
U.S. vs. Coke, 404 F. 2d 836
North Carolina vs. North, 381 F. 2d 636
People vs. Multier, 162 N.W. 2d 292
Gilbert vs. U.S., 401 F. 2d 507
State vs. Holmes, 161 N.W. 2d 650
State vs. Turner, 429 P. 2d 565

REASONS FOR GRANTING THE WRIT OF CERTIORARI

Our statement of the case, supra and in the transcript, establishes the following:

1. The government created a situation to ensnare the petitioner which depended, at least in part, upon the reliability of a criminal turned informant;

2. Another possibility was that he had manufactured a false case against the defendant so as to gain financial reward and to avoid imprisonment for a state offense.

3. As to the informant's direct claim, to the petitioner's attorney during arraignment, relating to the petitioner's guilt or innocence, it was not for the judge to unilaterally determine the intent of the informers; it should have gone to the jury.

4. The court's action penalizes the defendant for appealing his first conviction, because the first trial judge retained federal jurisdiction thereby forcing the state sentence to run concurrently. Here the judge has, in fact, increased the petitioner's sentence.

5. Government counsel concedes that there was substantial delay and that appellant was prejudiced by the delay.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should issue, the judgement of conviction should be reversed, and the indictment should be ordered dismissed, or a new trial should be ordered.

Respectfully submitted,

Wilford C. Rice
Attorney for Petitioner

Of Counsel:

Woodrow Boggs, Jr.

January 28, 1974

APPENDIX A
INDICTMENT

(Filed April 15, 1969)

THE GRAND JURY CHARGES IN COUNT ONE:

That on or about April 9, 1969 in the Eastern District of Michigan, Southern Division, JAMES RILEY, JR., FELIX WALLS and SYLVIA LASTER, defendants herein, did unlawfully and knowingly purchase a quantity of narcotic drugs, to wit: approximately 3,092 grams of heroin (and 23.58 grams of cocaine), not in or from the original stamped package and not having on it the appropriate tax-paid United States Internal Revenue stamps, as required by law; in violation of Section 4704(a), Title 26, United States Code.

THE GRAND JURY FURTHER CHARGES IN COUNT TWO:

That on or about April 9, 1969 in the Eastern District of Michigan, Southern Division, JAMES RILEY, JR., FELIX WALLS and SYLVIA LASTER, defendants herein, did unlawfully acquire, conceal and have in their possession, after being imported and brought into the United States a quantity of narcotic drugs, to wit: approximately 3,092 grams of heroin well knowing the aforesaid heroin to have been unlawfully imported and brought into the United States in violation of the provisions of the Act of Congress, approved February 9, 1909, as amended, and not under any regulations prescribed by the Commissioner of Narcotics; in violation of Section 174, Title 21, United States Code.

This is a True Bill,

/s/ Jean MacGregor

FOREMAN

ROBERT J. GRACE
United States Attorney

/s/ Kenneth G. McIntyre
KENNETH G. McINTYRE
Assistant United States Attorney

Dated: April 15, 1969.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO.

FELIX WALLS,

Petitioner

-v.-

UNITED STATES OF AMERICA,

Respondent

CERTIFICATE OF SERVICE OF PETITION
FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SIXTH CIRCUIT

I hereby certify that a copy of the Petition for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit was served by mail, postage prepaid this 28th day January, 1974, upon Robert H. Bork, Solicit or General, Department of Justice, Washington, D. C. 20530 and Ralph B. Guy, Jr., United States Attorney, and Clyde B. Pritchard 815. Federal Building, Detroit, Michigan 48226.

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APPENDIX B
No. 73-1417

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	ORDER
	)	
FELIX WALLS	)	
	)	
Defendant-Appellant	)	

Before: EDWARDS, CELEBREZZE and McCREE, Circuit Judges.

Appellant's petition for rehearing having come on to be heard, and no judge of this Court having requested a vote on the suggestion that it be considered en banc,

IT IS ORDERED that the petition be, and it is, hereby denied.

Entered by order of the Court.

/s/ James A. Higgins

Clerk

APPENDIX C
No. 73-1417

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff-Appellee	)	
	)	
v.	)	ORDER
	)	
FELIX WALLS,	)	
	)	
Defendant-Appellant	)	

Before: EDWARDS, CELEBREZZE, and McCREE, Circuit Judges.

Appellant was convicted of the unlawful purchase of heroin and possession of heroin unlawfully imported into the United States, in violation of 26 U.S.C. §4707(a) and 21 U.S.C. §174. A previous conviction on these same counts was reversed by this Court, 443 F.2d 1220.

Appellant assigns numerous counts of error, including objections to evidence allegedly seized in violation of his Fourth Amendment rights, improper prosecutorial argument, violation of the Double Jeopardy Clause, denial of a speedy trial, ineffective assistance of counsel, and other claims. We find merit in none of these claims. Upon due consideration of the record on appeal briefs of the parties and oral arguments of counsel we conclude that no error prejudicial to the rights of Appellant occurred in the proceedings in the Trial Court.

It is ORDERED that the judgment of the District Court be and it is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ James A. Higgins

Clerk